only was certified to the Supreme Court. The court however decided that it could consider the case on both grounds of appeal. There were therefore only two questions before the court: (1) Does this bill present a case for federal jurisdiction? (2) Do the facts alleged call for equitable relief on the ground of the unconstitutionality of the franchise provisions? The first ground in the plaintiff's bill, — that he was denied registration although qualified according to the terms of the franchise law, — not being within the statute allowing direct appeals, was not before the court. With regard to federal jurisdiction, the court decided that, although there was no allegation in the bill that the matter involved at least $2,000,[2] since that fact was not taken advantage of in the court below, it could not be raised on appeal. It was then expressly assumed without decision that the case was in other respects [3] within the federal jurisdiction. The second question then remained. It was answered in the negative on the following three grounds: (1) Without discussion, that equity will not interfere to enforce a political right; (2) that precedent to granting the plaintiff's petition, the court would be obliged to declare unconstitutional the very franchise provisions under which the plaintiff asks to be registered; (3) that equity could not enforce its decree without policing the state to secure undiscriminating registration, which it cannot undertake to do.

While the first and third grounds for the court's decision are probably sound,[4] the second, on which the case was chiefly rested, is undoubtedly conclusive against the plaintiff. Under the statutory limitations of this appeal the court could only give relief by deciding that the registration scheme was unconstitutional. If, however, the provisions were unconstitutional, no one would have a right of registration. This plaintiff, therefore, would have no cause of action for the denial of registration, since there had been a violation of no right. On analysis, therefore, contrary to what might be thought, this case does not turn upon a question of constitutional law.

RECENT CASES.

ADVERSE POSSESSION — HOLDING UNDER DOWER RIGHT. — *Held*, that in the absence of a divestiture of her dower right, a widow's claim of ownership of land held in possession under such right is unavailing, of itself, to start the running of the statute of limitations as against the owner. *Allison* v. *Robinson*, 34 So. Rep. 966 (Ala.). For a discussion of the principles involved, see 14 HARV. L. REV. 149.

BANKRUPTCY — INVOLUNTARY PROCEEDINGS — ANSWER BY ATTACHING CREDITOR. — The Bankruptcy Act of 1898, after defining the term "creditor" as any one having a provable claim, provides that "creditors other than the original petitioners may . . . file an answer, and be heard in opposition to the prayer of the petition." *Held*, that an attaching creditor may contest the petition without surrendering his preference. *In re C. Moench & Sons Co.*, 123 Fed. Rep. 977 (Dist. Ct., W. D. N. Y.).

It has repeatedly been held that an attaching creditor cannot, without surrendering his preference, file a petition to have his debtor declared a bankrupt. *In re Burlington Malting Co.*, 109 Fed. Rep. 777; *In re Schenkein*, 113 Fed. Rep. 421. The principal

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[2] Required for jurisdiction. 25 St. c. 866, § 1, p. 434.
[3] U. S. Comp. St. 1901, § 1979.
[4] Green *v.* Mills, 69 Fed. Rep. 852.

case, however, is believed to be the first under the new law to raise the question of the right of a preferred creditor to resist the adjudication without surrendering his preference. Under the Act of 1867, which contained no express provision on the point, although the decisions are not entirely uniform, such a right was usually admitted, on the ground that, while such a creditor had not a provable claim, he was nevertheless interested in the result, since an adjudication of bankruptcy would dissolve his attachment. *In re Hatje*, 6 Biss. (U. S. D. C.) 436. The principal case holds the same reasoning applicable under the new statute. Although the rule laid down may doubtless be supported by strong reasons of practical justice, it must be admitted that the construction adopted seems inconsistent with the plain words of the Act.

BANKRUPTCY — PRIORITY OF CLAIMS — RIGHT OF PARTNERSHIP CREDITORS TO SHARE IN INDIVIDUAL ESTATE. — A partnership and both partners became insolvent. One of the partners was subsequently adjudged a bankrupt. It did not appear that the other had become solvent. There were no partnership assets. *Held*, that the partnership creditors are entitled to share *pro rata* with the individual creditors in the bankrupt's estate. *Conrader* v. *Cohen*, 121 Fed. Rep. 801 (C. C. A., Third Circ.).

The Bankruptcy Act of 1898, § 5, provides that a partnership may be adjudged a bankrupt, and that partnership property shall be appropriated to payment of partnership debts and individual property to payment of individual debts, the surplus only in either case to the payment of other claims. The provision was substantially the same in the Act of 1867. Where, however, there are no firm assets and no solvent living partners, the courts have generally made an exception to this rule by allowing all the creditors to share *pro rata*. *In re Downing*, 1 Dill. (U. S. C. C.) 33; *In re Greene*, 116 Fed. Rep. 118. This exception crept into the law as the result of a misconception in an early English case. *Ex parte Pinkerton*, 6 Ves. 814. That case confused forms of remedies with substantial rights, as is clearly shown in a recent case repudiating the exception. *In re Wilcox*, 94 Fed. Rep. 84. It is to be regretted that the court in the principal case follows blindly the weight of authority instead of interpreting the act in the light of the history of the question.

BANKS AND BANKING — POWER OF ATTORNEY TO DRAW ON A DEPOSIT. — The deceased instructed a savings bank to enter his wife's name with reference to his account, so that she might be able to draw on it equally with him. While he was on his death-bed, his wife had the account transferred to her individual name. Later his administrator sued the wife for the amount of the account. *Held*, that the amount must be returned. *Burns* v. *Burns*, 93 N. W. Rep. 1077 (Mich.). See NOTES, p. 122.

CEMETERIES — BURIED CORPSE NOT REALTY. — The New York Code of Civil Procedure, § 982, provides substantially that all actions involving any interest in real estate shall be brought in the county where the realty is situated. The plaintiffs, acting under this section, brought an action for the removal of their mother's body, interred in the defendant's cemetery, in the county where the cemetery was located. *Held*, that the action is not one involving realty. *Cohen* v. *Congregation Shearith Israel*, 85 N. Y. App. Div. 65.

Courts have frequently held, though such a holding was not essential to their decisions, that a corpse permanently buried becomes a part of the realty like other objects attached to the land. See *Meagher* v. *Driscoll*, 99 Mass. 281. It has long been held, however, that the coffin and shroud do not become part of the land. *State* v. *Doepke*, 68 Mo. 208. See 2 BL. COM. 429. Hence it would seem to follow that the inclosed body also remains distinct from the realty. A further reason for this view is found in the peculiar nature of the rights in a corpse. Compelled to take jurisdiction by the failure of the ecclesiastical courts, the common law now recognizes the existence of a right in those most concerned for purposes of the burial and protection of the cadaver. See 6 AM. L. REV. 182. This quasi-property right is held to continue after burial and not to exist solely in the proprietor of the burial ground. *Pierce* v. *Proprietors of Swan Point Cemetery*, 10 R. I. 227. For these reasons it would appear that the principal case represents the better view in deciding that the corpse remains wholly unincorporated with the realty. *In re Beekman St.*, 4 Bradf. (N. Y.) 503.

CONFLICT OF LAWS — JURISDICTION OVER TRUST CREATED ABROAD. — A domiciled Englishman married a Scotchwoman in Scotland. Personal property of the wife was put in settlement under Scotch law, a non-alienable, alimentary provision being made for the husband if he survived. The trustees were Englishmen. The husband survived and mortgaged his interest. The provision against alienation was valid by Scotch, but void by English law. The mortgagees claimed payment of the income. *Held*, that the mortgagees will prevail. *Re Fitzgerald*, [1903] 1 Ch. 933 (Eng., Ch. D.). See NOTES, p. 123.

CONSTITUTIONAL LAW — STATE CONTROL OF FEDERAL AGENCIES — NATIONAL BANKS. — The defendant was convicted under a statute of Iowa, making any officer of any bank criminally liable for receiving a deposit while having knowledge of the bank's insolvency. *Held*, that the statute is unconstitutional so far as it applies to the officers of national banks. *Easton* v. *Iowa*, 188 U. S. 220.

It is acknowledged that the states may, as a general rule, punish any act made criminal by their law, although the same act may also be punishable by the United States. *Moore* v. *Illinois*, 14 How. (U. S.) 13; *Jett* v. *Commonwealth*, 18 Gratt. (Va.) 933. The states may not, however, punish an act as criminal, when such punishment is an interference with an agency of the national government, such as a national bank is held to be. *Cf. Davis* v. *Elmira Savings Bank*, 161 U. S. 275. The question here is, therefore, whether the statute prevented the bank from being conducted in the manner contemplated by Congress. The Federal statutes do not specifically authorize banks to receive deposits under the circumstances referred to in the Iowa statute. Nevertheless, they make provisions as to insolvent banks so minute that the court seems right in holding that they are meant to exclude any additional regulation by the states. *Cf.* U. S. Rev. Sts. §§ 5226–5238, 5242. The Iowa statute, while in form a criminal law, is in effect a regulation of the business of the bank when insolvent. It is, therefore, inconsistent with the Federal statutes, and necessarily falls.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — DISRESPECT OF COURT'S DECREE AGAINST ANOTHER. — The defendant trespassed on certain land. The court had previously enjoined other persons, who claimed that the land was public, from trespassing on the property, and the defendant knew of this injunction. *Held*, that the defendant is guilty of contempt of court. *Chisholm* v. *Caines*, 121 Fed. Rep. 397 (Circ. Ct., Dist. of S. C.).

No person is bound directly by an injunction, and hence no one can violate an injunction, unless he was a party to the injunction proceedings or a privy thereto. *Randall* v. *People*, 73 N. Y. 416. Though not bound directly, one may nevertheless, by aiding and abetting the person enjoined to violate the injunction, show such disregard of the court as to be in contempt. Such is the result of a number of cases. *In re Reese*, 107 Fed. Rep. 942; *Seaward* v. *Paterson*, [1897] 1 Ch. 545. The present case is a decided advance on those cases in that it punishes for contempt one who was neither a party, privy, nor abettor, but an independent trespasser. The result would seem to follow in this case that hereafter every trespasser on that land would be in contempt. Such an inroad upon the common law jurisdiction seems, however, indefensible. An ordinary trespasser would seem to be merely in disregard of the common law rules of property, not in contempt of the court's decision. Only a person claiming in the right already adjudicated would be trying violently to reopen the decree. Such a person might properly be held in contempt.

COPYRIGHTS — WHAT CONSTITUTES INFRINGEMENT. — The plaintiff was the publisher of the "Encyclopedia of American and English Law"; the defendant was compiling a work called the "Cyclopedia of Law and Procedure." The defendant gave to its editors lists of the cases cited in the plaintiff's books. The editors then examined the original cases and used them, together with other authorities, as the basis of their articles, but did not in any way refer to the text of the plaintiff's work. The plaintiff contended that this was an infringement of its copyright, and sought a preliminary injunction to restrain the publication of the defendant's Cyclopedia. *Held*, that the plaintiff is not entitled to an injunction. *Edward Thompson Co.* v. *American Law Book Co.*, 122 Fed. Rep. 922 (C. C. A., Second Circ.).

It is well agreed that the fact that the plaintiff's sources of information are open to all is not a defense, if the defendant has copied the plaintiff's work without independent investigation. It is equally clear that a person who has made a compilation of materials open to all cannot prevent others from making similar compilations on their own account. See *Gray* v. *Russell*, 1 Story (U. S. C. C.) 11. The difficulty comes in cases between these extremes. The rule has been laid down in England that one may not take another's work, verify it by reference to the original authorities, and then copy it bodily; on the other hand, an author may use another's work as a guide to common sources of information, provided that the final product is based on an independent examination of these sources. See *Morris* v. *Wright*, 5 Ch. App. 279. Applying this test to the principal case, the decision seems sound. There appears to be no American case on the precise point, but the tendency of the authorities is in favor of this view. *Cf. Mead* v. *West Publishing Co.*, 80 Fed. Rep. 380.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — POWERS OF AN AGENT. — Negotiable bonds of the plaintiff corporation were brought by its treasurer,

without authority from the corporation, to the defendant to be sold. The defendant knew that the bonds belonged to the plaintiff, but had no reason to doubt the treasurer's authority to sell. The defendant negotiated the sale and the treasurer converted the proceeds. *Held*, that the defendant is liable for the value of the bonds. *Jennie Clarkson Home* v. *Chesapeake & O. R. Co.*, 83 N. Y. Supp. 913 (N. Y., Sup. Ct.).

Since the bonds were negotiable, the defendant acquired legal title to them. And as a person dealing innocently with a legal title is not liable to the equitable owner, the defendant cannot be held unless he is chargeable with notice of the treasurer's breach of duty. *Cooper* v. *Illinois Cent. R. Co.*, 38 N. Y. App. Div. 22. The court considers that the defendant was bound to know the treasurer's authority. Many courts say that one must at his peril ascertain the authority of corporate agents. *Alexander* v. *Cauldwell*, 83 N. Y. 480. To this broad statement, however, there should be limitations. While the public may well be charged with notice of limits imposed by the charter or other public documents, it seems too much to require that they know facts as to the internal management of the corporation. *Louisville, etc., R. Co.* v *Louisville Trust Co.*, 174 U. S. 552; *Walker* v. *Detroit Transit R. Co.*, 47 Mich. 338. As the treasurer's authority in the principal case apparently depended on an act not publicly recorded, namely, a vote of the directors, it is harsh to hold the defendant bound at his peril to know that authority. *Akin* v. *Blanchard*, 32 Barb. (N. Y.) 527.

CUSTOMS DUTIES — POWER OF TREASURY DEPARTMENT TO REMOVE GOODS FROM DISTRICT. — The plaintiffs had imported diamonds into Providence *via* New York, and had paid the estimated duty, but no appraisal had been made. The collector of the port of Providence, under the orders of the Treasury Department, was about to send them to New York to be appraised, when the defendants moved for a preliminary injunction restraining him. *Held*, that the injunction will be granted. *Bruhl Bros. & Co.* v. *Wilson*, 123 Fed. Rep. 957 (Circ. Ct., Dist. of R. I.).

Apparently this is a case of first impression. The court says that any direction by the Treasury to transport the goods is unauthorized by law, on the ground that, if it is to be done by a Treasury agent, it would be in violation of the statute making the collector custodian, or, if by the collector himself, it would be forcing him to act outside his district. *Cf. Morrill* v. *Jones*, 106 U. S. 466, and *United States* v. *Adams*, 24 Fed. Rep. 348. Although an earlier case decided that, if necessary, samples could be removed for appraisal, it contained a *dictum* in accord with the present decision as to the removal of the bulk of the goods. *Goodsell* v. *Briggs*, 1 Holmes (U. S. C. C.) 299. Another argument of great weight with the court was that, if the Treasury Department is allowed this power, it virtually nullifies the statute providing for immediate transportation to the port of ultimate destination. U. S. Comp. St. 1901, p. 1964. The effect of this decision, which certainly seems sound, will be to benefit importers outside New York by making their importations less subject to delay and easier to conceal from competitors.

ELECTRIC WIRES — LIABILITY OF A PERSON SUPPLYING ELECTRICITY TO ANOTHER'S WIRES. — The defendant supplied power for an electric railway, but the lines were owned and operated by the railway-company. Through defective insulation of the wires of the railway-company the plaintiff's intestate was killed by an electric shock. *Held*, that the defendant is liable. *Maysville Gas Co.* v. *Thomas' Adm'r*, 75 S. W. Rep. 1129 (Ky.).

This is apparently the first judicial expression upon the liability of electric power companies for damage done by the current after it leaves their wires. The ground of the decision is that the defendant is under a duty to see that the wires are properly insulated before charging them with electricity. While the result reached in the case may be correct under the particular facts, the rule laid down by the court seems questionable, and likely to work injustice in many cases if generally followed. The true rule in this case, as in all cases of negligence, should be that the defendant owes a duty of ordinary care under the circumstances, the degree of care being always commensurate with the dangers incident to the nature of the business. See *Denver, etc., Co.* v. *Simpson*, 21 Col. 371. Whether or not a particular duty is included under this general rule should be a question of fact for the jury.

EQUITY — DISCRETION TO REFUSE TO AID AN ILLEGAL UNDERTAKING. — The plaintiff sued to restrain the defendant from obtaining or selling quotations of prices of commodities dealt in on the floor of the plaintiff's exchange. The great majority of the contracts made on the exchange were gambling transactions. *Held*, that the plaintiff's property right in the quotation is so infected with illegality that a court of equity will not protect it. *Board of Trade of Chicago* v. *L. A. Kinsey Co.*, 35 Chic. Leg. News. 435 (U. S. Circ. Ct., Dist. of Ind.).

For a discussion of the principles involved, see 16 HARV. L. REV. 444.

EVIDENCE — TESTIMONY GIVEN AT A FORMER TRIAL — JOINT DEFENDANTS. — Two defendants were jointly indicted for larceny. At a former trial of one of them upon the same charge, a witness testified in his behalf. The witness having since died, his testimony was offered in evidence in the present trial by the former defendant, but on the objection of the co-defendant was excluded. *Held*, that the evidence is admissible so far as it concerns the former defendant. *State* v. *Milam*, 43 S. E. Rep. 677 (S. C.).

Testimony given at a former trial by a witness since deceased is admissible if the issues and parties of the two trials are identical. *Orr* v. *Hadley*, 36 N. H. 575. If, in the second trial, one of two original joint-defendants is omitted, the testimony of a deceased witness for the defense is still admissible. *Wright* v. *Doe* d. *Tatham*, 1 A. & E 3. What is essential is that the party against whom the evidence is now introduced should have had an opportunity to cross-examine at the former trial. In the present case, while the prosecution had the opportunity of cross-examining the deceased witness, and cannot now exclude his testimony, the present co-defendant obviously may be prejadiced by testimony which he had no opportunity to cross-examine. On the other hand, considerable harm may be done the original defendant by excluding testimony in his behalf. For this reason, if the prejudice to the co-defendant be merely remote and inferential, the testimony might be admitted so far as concerns the former defendant. But if the prejudice to the co-defendant be immediate and direct, it would seem that the testimony should be excluded.

GRATUITOUS UNDERTAKINGS — LIABILITY OF AGENT. — The defendant, an insurance agent, gratuitously offered to place additional insurance for the plaintiff and to notify the other companies of the increase. He neglected the notification, and, as a result, when the premises burned, the plaintiff was forced to settle at a loss. *Held*, that the defendant is liable. *Barber* v. *Jones*, 2 Can. L. Rev. 658 (Sept. 1903). See NOTES, p. 126.

INJUNCTIONS — PROTECTION OF CONTRACT RIGHTS BY ENJOINING ACTS AGAINST THIRD PERSONS. — The plaintiff had large contracts both for the purchase of coal from mine owners and for its delivery to customers. The defendants were maintaining a strike by means of intimidation, and were unlawfully preventing others from working the mines from which, according to the plaintiff's contracts, the coal was to be supplied. The plaintiff applied for an injunction to restrain such unlawful acts. *Held*, that the injunction will be granted. *Carroll* v. *Chesapeake & O. Co.*, 124 Fed. Rep. 305 (C. C. A., Fourth Circ.).

This decision affirms the opinion of the Circuit Court in the same case, which was discussed in 16 HARV. L. REV. 600.

INSURANCE — AMOUNT OF RECOVERY. — A partial loss occurred under a policy of fire insurance. The cost of restoring the building to its former condition would have been thirty thousand dollars. Owing to the building laws, however, the structure could be repaired only by the expenditure of forty-five thousand dollars. *Held*, that the latter amount is the measure of the insurer's liability. *Hewins* v. *London Assur. Corp.*, 68 N. E. Rep. 62 (Mass.).

A fire insurance policy is a contract of indemnity: hence the measure of damages is the difference between the actual value of the property immediately before and immediately after the loss, and not necessarily the cost of restoration. *State Ins. Co.* v. *Taylor*, 14 Col. 499. Accordingly if the restoration of the injured building is forbidden by statute, its value being totally annihilated, the loss is properly held to be total. *Larkin* v. *Glens Falls Ins. Co.*, 80 Minn. 527. The court in the principal case, however, would appear to be mistaken in considering its decision to be a necessary deduction from this. The increased cost of repairs due to the building laws would probably result in an increased value in the renovated building due to the use of the better materials or to the more substantial construction required, though the increase would not necessarily amount to the increase in the cost of repairs necessitated by the statutes. To the extent of this increased value, the insured has suffered no pecuniary loss. Consequently it would seem that the referee should have been instructed to ascertain and deduct this amount from the insurer's liabiity. *Waynesboro Fire Ins. Co.* v. *Creaton*, 98 Pa. St. 451.

INSURANCE — EFFECT OF FAILURE TO PAY NOTES GIVEN FOR PREMIUM. — The insured, being unable to pay a certain annual premium on a life insurance policy, gave his promissory note, which provided that if the note was not paid at maturity the policy should be void. The policy itself contained no stipulation to that effect. The

note was not paid at maturity. Upon the subsequent death of the insured this action was brought on the policy. *Held*, that the policy is rendered void by the non-payment of the note. *Ressler* v. *Fidelity Mut. Life Ins. Co.*, 75 S. W. Rep. 735 (Tenn.).

It is generally recognized that failure to pay premiums when due releases the insurer from liability on a contract of insurance. When a note, containing a clause of forfeiture for non-payment at maturity, no such stipulation having been inserted in the policy, is taken for a cash premium, the legal effect of such non-payment is not clearly established. It has been held that the insurer is thereby merely given the option of declaring a forfeiture, which must be asserted by some affirmative act. *Mut. Life Ins. Co.* v. *French*, 30 Oh. St. 240. Other courts hold that the non-payment, *ipso facto*, renders the policy void. *Holly* v. *Metropolitan Life Ins. Co.*, 105 N. Y. 437; *Frank* v. *Sun Life Assurance Co.*, 20 Ont. App. 564. The latter view, which finds further support in the principal case, seems theoretically sound. The acceptance of the note operates as a waiver for the specified time of the company's right to avoid the contract, and it must follow that if the note is not paid at maturity the insurer's liability on the contract thereupon ceases, the forfeiture clause being important only as precluding the possibility of finding a further waiver.

INSURANCE — MUTUAL BENEFIT INSURANCE — AMENDMENT OF BY-LAWS. — According to the by-laws of a mutual benefit association, of which the plaintiff was a member, his dues were fixed at a certain sum. An amendment materially increasing his monthly payment was passed without his consent. *Held*, that the amendment is void as to him. *Miller* v. *Tuttle*, 73 Pac. Rep. 88 (Kan.). See NOTES, p. 127.

JUDGMENTS — SETTING ASIDE — FAILURE TO MAKE DEFENSE. — The defendant knew the day on which trial was to take place. On that day his attorney telegraphed him not to attend. The attorney, although he knew of a defense, failed to make it, and judgment was given for the plaintiff. *Held*, that the judgment should be set aside. *Barton* v. *Harker*, 55 Atl. Rep. 105 (N. J., Sup. Ct.).

Where a party who has a good defense on the merits and has used all reasonable diligence, has nevertheless failed to make his defense on time, there is a strong argument for reopening the case. The court here sets aside the judgment on the ground that the defendant was misled by his counsel. A few courts, usually influenced by statutes, have gone so far as to consider erroneous advice by counsel a sufficient excuse for failure to defend. *Whereatt* v. *Ellis*, 70 Wis. 207. However, if justice is to be speedily administered, judgments should be reopened only for urgent reasons. Accordingly when the lack of defense is due to erroneous advice, rather than to ignorance of facts, most courts consider the excuse insufficient. *Cox* v. *Armstrong*, 43 S W. Rep. 189 (Ky.); *Anderson* v. *Carr*, 7 N. Y. Supp. 281. Again, the negligence of the counsel in the principal case may, as a matter of agency, well be treated as the negligence of the defendant. *Ex parte Walker*, 54 Ala. 577. The defendant's excuse for omitting his defense, therefore, hardly justifies setting aside the judgment.

LEGACIES AND DEVISES — BEQUESTS VOIDABLE BY STATUTE — POWER TO INVOKE STATUTE. — A statute provided that no person having a husband, wife, child, or parent should bequeath to any charitable or religious association more than one-half of his estate after the payment of his debts. A married woman whose husband, by an ante-nuptial agreement, had released all right of inheritance from her, made a will in violation of the statute and died, leaving an estate consisting solely of personal property, which, had she died intestate, would, in the absence of the release, have descended entirely upon her husband. *Held*, that the next of kin cannot invoke the operation of the statute. *Board of Home Missions, etc.* v. *Wilcox*, 85 N. Y. App. Div. 132.

The courts of New York have experienced considerable difficulty in determining the rights of the next of kin under the above statute. The early cases held that the statute was peremptory, and might be insisted upon by any relative who would derive a direct benefit therefrom. *Harris* v. *American Bible Society*, 2 Abb. App. Dec. 316. A late case goes to the other extreme by deciding that the purpose of the statute is merely to protect the interests of the persons expressly designated; and that, if the next of kin would take nothing through such a person, he cannot take advantage of the statute. *Frazer* v. *Hoguet*, 65 N. Y. App. Div. 192. The principal case, however, by an express modification of that doctrine, declares that the next of kin should be allowed to invoke the statute, but only where he would inherit in connection with one of the persons named therein, and not, as here, only in substitution for him. This construction, while perfectly possible, and in line with the most recent cases, is certainly opposed to the spirit of all of the earlier decisions. *McKeown* v. *Officer*, 6 N. Y. Supp. 201.

MUNICIPAL CORPORATIONS — RIGHT OF CORPORATOR TO INSPECT MUNICIPAL RECORDS — ENFORCEMENT BY MANDAMUS. — A tax-payer of a municipal corporation, believing that the public funds had been mismanaged, applied to the mayor for permission to make a general inspection of the books of the corporation. The request was refused. *Held*, that the mayor will be compelled by a writ of mandamus to permit such an inspection. *State* v. *Williams*, 75 S. W. Rep. 948 (Tenn.).

Though the right of a corporator to inspect municipal records where his interest is private, and the inspection desired is restricted, is established, his right to a general inspection, where his interest is public, has not been so well recognized. Several early English cases proclaim such a right, *Herbert* v. *Ashburner*, 1 Wils. 297; but in very few of them was affirmance of the right necessary to the decision. See *Rex* v. *Merchant Tailors' Co.*, 2 B. & Ad. 115. The few American cases in point are in conflict. *State* v. *Williams*, 41 N. J. Law 332; *People* v. *Cornell*, 35 How. Pr. (N. Y.) 31, reversing 47 Barb. (N. Y.) 329. In the case of private corporations the right of a stockholder to a general inspection of the corporate books is in a similar state of uncertainty, although recognized in most states by statute. See *Re Steinway*, 159 N. Y. 250. The chief objection to the recognition of such a right is that it would be greatly abused and that corporate management would be seriously impeded. But the fact that the issuance of a writ of mandamus is almost wholly discretionary seems to obviate the difficulty, since the court need issue the writ only where under the circumstances the application seems reasonable.

NEGLIGENCE — LIABILITY FOR MALPRACTICE — CHRISTIAN SCIENCE. — The defendant, a Christian Scientist, who held himself out as competent to treat diseases, undertook for reward to treat the plaintiff for appendicitis. The treatment was that usually given by Christian Science "healers" in such cases, but the plaintiff suffered injury. *Held*, that the defendant is not liable on a count for negligence. *Speed* v. *Tomlinson*, N. H. Sup. Ct. Oct. 6, 1903.

The decision is placed on the ground that the defendant's duty was determined by his profession of skill, which extended no further than skill in the practice of Christian Science. It is well settled that a person professing to follow one system of medical treatment cannot be expected by his employer to practise any other, *Bowman* v. *Woods*, 1 Greene (Ia.) 441; and it is also held that one who treats a patient without having or pretending to have medical skill incurs no professional responsibility. *Higgins* v. *McCabe*, 126 Mass. 13. It would seem, therefore, that, whether Christian Science be considered a school of medicine or a humbug, the case is sound law. A Wisconsin case in which the liability of a clairvoyant physician for malpractice was considered was decided the other way, on the ground that clairvoyance was not a school of medicine. *Nelson* v. *Harrington*, 72 Wis. 591. That decision is hard to support, however, and the principal case is believed to represent the better view.

PARENT AND CHILD — PARENT'S RIGHTS IN RELIGIOUS TRAINING OF CHILD. — Children had been taken from their father, a Catholic, because of his unfitness to control them. Their aunt, a Protestant, and their grandmother, a Catholic, both petitioned for their custody. *Held*, that custody will be awarded to the grandmother since she is of the same religion as the father. *Matter of Jacquet*, 40 N. Y. Misc. 575. See NOTES, p. 128.

PROXIMATE CAUSE — CONCURRENT CAUSES. — The plaintiff's parent died from the combined effects of injuries caused by the defendant's negligence, and of a subsequent illness. By statute, actions for personal injuries survived after death only in case the death was not caused by the injuries. The court instructed the jury that if death would not have resulted from the illness alone, but was in part caused by the injuries, the death was the result of such injuries. *Held*, that the charge is erroneous. *Ellyson* v. *International, etc., R. R. Co.*, 75 S. W. Rep. 868 (Tex., Civ. App.).

The law is settled that if, by reason of the plaintiff's peculiar physical condition, the defendant's negligence leads to unusually severe injuries, the loss is the direct consequence of the negligence, and the plaintiff can recover for the whole. *Louisville, etc., R. Co.* v. *Falvey*, 104 Ind. 409. Cases in which an intervening illness, unconnected with the defendant's wrongful act, becomes an important factor in the injurious consequences are much more rare, and the legal responsibility is less clear. It has been held that the defendant can escape liability only if the intervening illness must have produced the fatal result quite independently of the injury. *Louisville, etc., R. R. Co.* v. *Jones*, 3 So. Rep. 902 (Ala.). Such a principle necessarily makes the *causa sine qua non* the legal cause. The principal case, however, takes the view that the defendant should not be held unless the negligent act was not only one of the causes, but the

prominent, efficient cause of the injury. It is believed that this rule leads to the fairer answer to what is, after all, the common sense question involved, namely: Did the defendant cause this death? *Pierce* v. *Michel*, 60 Mo. App. 187.

PROXIMATE CAUSE — INTERVENING ACTS OF THIRD PARTY. — The defendant company, which was under a duty to inspect the brakes on its cars, allowed a shipper to move a car which had not been inspected, and in consequence of the defective condition of the brakes the plaintiff was injured. *Held*, that the defendant cannot escape liability merely because the car was handled by a shipper. *Boyd* v. *Seaboard, etc., R. Co.*, 45 S. E. Rep. 186 (S. C.).

For a discussion of the principles involved see 16 HARV. L. REV. 227.

PROXIMATE CAUSE — NEGLIGENT INJURY RESULTING IN SUICIDE. — The plaintiff's testator became insane and committed suicide in consequence of an injury negligently inflicted by the defendant. *Held*, that the defendant is not liable for the suicide. *Daniels* v. *New York, etc., R. R. Co.*, 67 N. E Rep. 424 (Mass.). See NOTES, p. 125.

RESCISSION — MISTAKE OF FACT. — The plaintiff, the beneficiary under a life insurance policy, agreed to assign his interest to the defendant. Both parties were ignorant of the fact that the insured was already dead. The defendant learned of the death before the assignment, but concealed his knowledge. *Held*, that the assignment may be set aside. *Scott* v. *Coulson*, [1903] 2 Ch. 249.

This decision affirms the holding of the lower court, which was discussed in 16 HARV. L. REV. 451.

RESCISSION — MISTAKE OF LAW. — The owner of certain interests in land encumbered by the plaintiff's mortgages died, leaving as heirs his widow and infant children. The plaintiff agreed to surrender the mortgages, and in return the widow agreed to convey all of decedent's interest in the land. Both parties overlooked the fact that the children were entitled to two-thirds of decedent's interest. After conveyance the plaintiff brought this action asking for a reinstatement of the mortgages. *Held*, that although the mistake is one of law the plaintiff is entitled to relief. *Hutchison* v. *Fuller*, 45 S. E. Rep. 164 (S. C.).

Although it is commonly laid down that mistake of law does not excuse, nevertheless equity does grant relief under the circumstances of this case. *Fullen* v. *Providence County Savings Bank*, 14 R. I. 363. This result is reached on various grounds. Often the case is treated as an exception to the general rule, based on the peculiar facts, *Benson* v. *Markoe*, 37 Minn. 30; or the mistake of law is considered analogous to, if not identical with, a mistake of fact. *Renard* v. *Clink*, 91 Mich. 1. Obviously the general rule was first adopted as a matter of policy rather than of logical necessity, and therefore is inapplicable when broader equitable considerations demand relief. Accordingly it seems a more accurate statement of the law to say that in general equity will interfere to prevent the unjust enrichment of one party and the unjust impoverishment of the other, whether caused by mistake of law or by mistake of fact; but that the hardship resulting from mistake of law must be so marked as to outweigh the practical danger of allowing a defendant to plead that he was mistaken as to the law.

RESTRICTIVE AGREEMENTS AS TO THE USE OF PROPERTY — PLAINTIFF'S LACHES AS A BAR TO EQUITABLE RELIEF. — The plaintiff laid out a tract of land as a seashore resort. All deeds of land sold contained a covenant that no business should be carried on upon the Lord's Day, together with other provisions intended to secure the whole tract as a religious resort. The plaintiff sought an injunction to restrain the defendant, who held under such a deed, from conducting a drug store on Sunday. The defendant admitted the breach, but maintained that several other grantees had, for a long time, conducted bath-houses and other businesses on Sunday, without serious objection on the part of the plaintiff. *Held*, that the plaintiff is not entitled to equitable relief. *Ocean City Association* v. *Chalfant*, 55 Atl. Rep. 801 (N. J. Eq.).

The court, apparently, takes the ground that, since the plaintiff has not enforced the covenants of other grantees, it is not fair that it should enforce the defendant's covenant. Two decisions by Lord Eldon are cited which contain expressions supporting this view. See *Roper* v. *Williams*, 1 Turn. & R. 18; and *Duke of Bedford* v. *Trustees*, 2 Myl. & K. 552. These *dicta*, however, are now repudiated, so far as they apply to cases in which, as here, the defendant has made no large expenditures in reliance on the plaintiff's acquiescence. *Knight* v. *Simmonds*, [1896] 2 Ch. 294. The modern authorities show that the true test is, rather, whether the general condition, in view of which the covenant was made, has so changed that an injunction to enforce it will simply annoy the defendant without really benefiting the plaintiff. *Knight* v. *Simmonds*,

supra; Lattimer v. *Livermore*, 72 N. Y. 174. It does not appear in the principal case that the plaintiff's failure to enforce other covenants had so changed the character of the place that the enforcement of the defendant's covenant would be of no substantial benefit, and, this being so, the decision can hardly be supported.

SALES — WARRANTIES — REMEDIES FOR BREACH. — The defendant sold personal property with warranty of title to the plaintiff, who resold with a similar warranty. In consequence of a title outstanding in a third person, the chattel was recovered from this vendee, who in turn recovered judgment against the plaintiff for the purchase money and costs, and also for the costs of the previous action. The defendant, though requested by the plaintiff to defend this action, failed to do so. The plaintiff then brought the present action for breach of warranty to recover the amount of the judgment recovered against him. *Held*, that the plaintiff may not recover the costs of the previous suits. *Smith* v. *Williams*, 45 S. E. Rep. 394 (Ga.).

Fairness requires that the warrantor of title should not be subjected against his will to the costs of more than one suit. In an action for breach of warranty of realty, the costs of prior litigation cannot be recovered unless the warrantor was notified of the suit and given opportunity to defend. *Point Street Iron Works* v. *Turner*, 14 R. I. 122. Upon this analogy, the rule has been that the warrantor of chattels who after notice neglects to defend against an adverse claim, is liable for all damages and costs incurred in reasonable defense. *Lewis* v. *Peake*, 7 Taunt. 153. This rule in England has been limited to cases in which the vendor might reasonably have contemplated at the time of the warranty that the probable result of breach would be an action by the sub-vendee. *Hammond* v. *Bussey*, 20 Q. B. D. 79. Since the present defendant appeared unapprised of the suit against the plaintiff's vendee, he cannot be liable for the costs of that suit. But the costs of the suit between the plaintiff and his vendee, which the defendant had opportunity to defend, seem fairly recoverable.

TAXATION — PROPERTY SUBJECT TO TAXATION — BEQUEST TO MUNICIPALITY. — The United States levied a succession tax on a bequest made to a municipality for a public purpose. The tax was claimed to be invalid because imposed on a state agency. *Held*, that the tax is valid. *Snyder* v. *Bettman*, 23 Sup. Ct. Rep. 803. White, Fuller, and Peckham, JJ., dissented.

It has been decided that the United States has power to impose succession taxes. *Knowlton* v. *Moore*, 178 U. S. 41. It is submitted that a succession tax may be on either the testator's privilege of devising or the beneficiary's privilege of receiving. It has been immaterial in previous cases which of these privileges was the object of the tax, but the principal case apparently turns on that point. If the tax is on the city's privilege of receiving, it should be held invalid, as the Federal government cannot properly tax the privileges of an agent of a state. *Cf. Pollock* v. *Farmers' Loan, etc., Co.*, 157 U. S. 429. If, on the other hand, as would appear from the phrasing of the statute, the tax is on the privilege of devising, it is imposed not on a privilege of the city, but of the testator, even though in the end the burden may fall on the city. *United States* v. *Perkins*, 163 U. S. 625. The result of the majority in the principal case, therefore, is entirely supportable. *Cf. Plummer* v. *Coler*, 178 U. S. 115.

TORTS — INTERFERENCE WITH OCCUPATION — BLACKLISTING. — The plaintiffs were members of a union. The defendant company, with intent to destroy the union, had discharged some of its members and intended to discharge all others. The discharged employees were prevented from obtaining new employment by means of a blacklist which contained their names and which was shown to other employers. *Held*, that an injunction will not be granted to restrain the defendant from maintaining the blacklist. *Boyer* v. *Western Union Tel. Co.*, 124 Fed. Rep. 246 (Circ. Ct., E. D. Mo.).

An injunction to restrain employees from boycotting an employer will be granted. *Casey* v. *Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 135. The crushing power of a boycott, however, which makes it a danger to the community, is essentially the product of exclusion from business intercourse with others. *Crump* v. *Commonwealth*, 84 Va. 927. Had the defendant, instead of merely showing his list, combined with other employers to prevent the plaintiffs from obtaining employment with third persons, the analogy to a boycott would seem complete, and there would be no apparent reason why equity should refuse to grant an injunction. But on principle an agreement of employers, in order more effectively to compete with employees, which seems to have been the real object in the present case, not to employ a particular person, is not distinguishable from an agreement of laborers, on similar grounds, not to work for a particular person. The latter, which is merely a strike, is recognized as legal. However, the relatively greater power of oppression controlled by a combination of employers has led some courts to declare such a combination illegal. *Mattison* v. *Lake Shore, etc.*,

R. R. Co., 3 Oh. S. C. & C. P. 526. In the absence of combination, the decisions on the point, though few in number, support the rule of the principal case. *Worthington* v. *Waring*, 157 Mass. 421.

TRADE UNIONS — STRIKES — COMPETITION AS JUSTIFICATION FOR PROCURING DISCHARGE OF FELLOW EMPLOYEE. — The defendants, members of a trade union, by means of a strike procured the discharge of the plaintiff, as a non-union man. The plaintiff had applied for admission into the union, and had been refused. The defendants had no malicious motive, but wished only to strengthen their union by excluding from employment all those considered by them unfit for admission to its membership. *Held*, that the defendants are not liable. *Martell* v. *Victorian Coal Miners' Ass'n*, 25 Austr. L. T. 40 (Victoria, Sup. Ct.).

The plaintiff, formerly treasurer of the defendant union, became indebted to it through mismanagement of the union's funds. The union, in order to enforce the payment of the debt, but without any purpose to punish the plaintiff, expelled him, and thereafter, by threatened strikes, prevented him from getting or retaining work. The members of the union had no personal objection to working with the plaintiff. *Held*, that the union is liable for the damage caused to the plaintiff. *Giblan* v. *National Amalgamated Labourers' Union, etc.*, 19 T. L. R. 708 (Eng., C. A.).

By an ever increasing weight of authority it seems clear that it is actionable to induce an employer by a threatened strike not to employ a workman, except where justification is shown. For a discussion of this principle, see 15 HARV. L. REV. 427–445, 482. Difficulty most frequently arises in determining what amounts to a justification. *Cf.* Lord Justice Romer in *Giblan* v. *National Amalgamated Labourers' Union, etc., supra.* The present cases are valuable not only in more firmly establishing the general rule of liability, but also in aiding to define the limits of the most common justification, competition. *Cf. Mogul S. S. Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25; *Bowen* v. *Matheson*, 14 Allen (Mass.) 499. The right to compete would seem to include both the right to exclude competitors from the field, by the use of means which are not *per se* illegal, and the right to refuse competitors admission to the defendant organization where the members so wish. On the other hand, the right of competition would not seem to include the right to collect debts, as a debtor is not a competitor of his creditor. Nor indeed is the purpose to collect a debt any justification, for the proper method of accomplishing that end is through the courts.

TRANSFER OF STOCK — RECOVERY FROM TRANSFEREE OF FORGED TRANSFER. — The defendant, an innocent purchaser of a forged transfer of stock, presented it to the plaintiff corporation, which registered him as a shareholder. He subsequently transferred to an innocent purchaser for value to whom the plaintiff issued certificates of registration. Neither the plaintiff nor the defendant was negligent. The plaintiff, being obliged to reinstate the original holder of the stock, sued the defendant for indemnity. *Held*, that the plaintiff cannot recover. *Mayor, etc., of Sheffield* v. *Barclay*, 19 T. L. R. 714 (Eng., C. A.).

For a discussion of the decision in the lower court, see 16 HARV. L. REV. 228.

TRUSTS — ASSIGNMENT OF TRUSTEE'S BENEFICIAL INTEREST — EFFECT OF TRUSTEE'S DEFAULT. — A trustee, who was also a beneficiary under the trust, assigned his beneficial interest and subsequently committed a defalcation. *Held*, that the amount of the trustee's defalcation may be deducted from the share of his assignee. *Cumming* v. *Austin*, 28 Vict. L. R. 622. See NOTES, p. 130.

WATERS AND WATERCOURSES — RIGHT TO DIVERT PERCOLATING WATER. — The defendant drained off the percolating water in his land for purposes other than the improvement of the premises or his own beneficial use, and thereby injured the plaintiff's water supply. *Held*, that the defendant will be restrained from so doing. *Stillwater Water Co.* v. *Farmer*, 93 N. W. Rep. 907 (Minn.).

The English doctrine recognizes the absolute right of the landowner to divert percolating waters. *Chasemore* v. *Richards*, 7 H. L. Cas. 349. But the American courts have never gone so far. Wherever interference with percolating waters has been allowed it has been incident to a reasonable use of the land. See *Smith* v. *City of Brooklyn*, 18 N. Y. App. Div. 340. Diversion for any other purpose has been expressly decided to be unlawful. *Katz* v. *Walkinshaw*, 70 Pac. Rep. 663 (Cal.). The decision in the principal case is in accord with previous American cases on the point, and with the general tendency of the law of this country to restrict the right of interference with waters of this character. On principle, the doctrine seems clearly sound, as tending to protect the one party from wanton injury while assuring to the other the free beneficial use of his property.

WATERS AND WATERCOURSES — RIGHTS OF NON-RIPARIAN OWNERS. — The plaintiffs, neither owning nor leasing any land abutting on a river, leased from a power company the right to draw water from the power-canals which it had dug above its dam upon the river. A city higher up the stream was impliedly authorized by statute to drain its sewage into the stream. *Held*, that the plaintiffs can recover in an action against the city for pollution of the water. *Doremus* v. *City of Paterson*, 55 Atl. Rep. 304 (N. J., C. A.).

For a discussion of the decision in the lower court, see 16 HARV. L. REV. 145.

WILLS — CONSTRUCTION — EXTRINSIC EVIDENCE. — The testator made certain pecuniary bequests by his will. Subsequently he made certain smaller pecuniary bequests to several of the same legatees without stating whether these were to be substitutionary or cumulative. *Held*, that parol evidence that the testator knew that his estate was decreasing and that it might not be able to meet all the bequests in the will, is admissible to prove that the legacies in the codicil were intended to be substitutional. *Gould* v. *Chamberlain*, 68 N. E. Rep. 39 (Mass.).

Extrinsic evidence is necessarily admitted to identify the persons and things referred to in any writing. *Webster* v. *Morris*, 66 Wis. 366. But apart from this, the general rule is that a will, like other formal writings, must be construed solely by an inspection of the instrument itself; for otherwise no man could draw up his will with any certainty as to its effect. *Jackson* v. *Alsop*, 67 Conn. 249. An apparent exception exists where parol evidence is admitted to rebut an equitable presumption. *Livermore* v. *Aldrich*, 59 Mass. 431. The exception, however, is apparent only; for the evidence is admitted only to uphold the literal interpretation of the document by rebutting the equitable presumption to the contrary; and it is not admitted to support the equitable presumption in contradiction of the writing *Hurst* v. *Beach*, 5 Madd. 351. As the evidence in the principal case was offered to rebut the strict construction of the documents, it would seem that it ought to have been excluded. *Wilson* v. *O'Leary*, 7 Ch. App. 448. There are, however, previous *dicta* which appear to support the position of the court. See *Crocker* v. *Crocker*, 28 Mass. 252, 256.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

CLUB TRUSTEES' RIGHT TO INDEMNITY. — It has been held by the Judicial Committee of the Privy Council that a *cestui que trust* of stock is personally bound to indemnify the trustee against expenses incurred by reason of the latter's legal title. *Hardoon* v. *Belilios*, [1901] A. C. 118. The same court recently decided that club trustees have no rights of indemnity against a member for liabilities incurred under a lease after the dissolution of the club. *Wise* v. *Perpetual Trustee Co. Ltd.*, [1903] A. C. 139. The court distinguished the cases on the ground that the recognized terms of club membership limit the liability of each member to the amount of his subscription. With this distinction a recent writer takes issue. *Club Trustees' Right to Indemnity: A Criticism of Wise* v. *Perpetual Trustee Co. Ltd.*, by T. Cyprian Williams, 19 L. Quart. Rev. 386 (Oct., 1903). The author clearly shows that the cases relied on by the court hold merely that no power is given to club officers to pledge the credit of members beyond the amount of dues payable. If, then, he argues, the ordinary liability incident to equitable ownership be lacking here, it must be because of some understanding between the parties. But no such agreement can possibly be implied in fact since the members derive all the benefit and the trustees none from the transaction. This criticism seems well founded. But Mr. Williams also suggests that any such agreement would be void as against the policy of the law, because it separates the advantages from the burdens of property. But this position, as stated, seems clearly untenable. See *Ex parte Chippendale*, 4 De G., M. & G. *19, *52.